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VIA ECFS

EX PARTE

July 15, 2008

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas,* WC Docket No. 07-97

Dear Ms. Dortch:

Qwest Corporation ("Qwest") files this *ex parte* presentation regarding Qwest's pending petitions for forbearance in the Denver, Minneapolis-St. Paul, Phoenix and Seattle Metropolitan Statistical Areas. Qwest is concerned that the Federal Communications Commission ("Commission" or "FCC") may be preparing to inappropriately apply a "market share" test as a basis for denial of the pending Qwest petitions. In addition, for purposes of this *ex parte* presentation, Qwest fears that the Commission may be poised to misapply the legal standards applicable to forbearance petitions in several critical aspects.

As Qwest has argued separately, use of market share as a sole determinant of market power or position would be contrary to sound law or economics. Moreover, to the extent that market share is to be taken into account in assessing market power (Qwest does not argue that market share is irrelevant, only that it cannot be the sole determining factor in assessing the state of competition in a particular market), Qwest's actual share of the relevant market must be calculated and evaluated on the basis of evidence on the record. The Commission cannot ignore the existing record and deny the Qwest petitions in the hope that a better record might be developed later. Qwest is concerned that the approach that the Commission plans to follow would systematically and arbitrarily overstate Qwest's market share, in a manner that would deprive Qwest of forbearance relief to which it is entitled under the law. Specifically, there is a possibility that the Commission would consider market share figures that ignore the national "cut-the-cord" numbers that have been used in the past, choosing instead to demand that Qwest

produce some other numbers that have not yet been collected or analyzed.[1] This error would be especially egregious because it would be predicated on an erroneous reading of the legal standard that must govern decisions involving properly supported forbearance petitions.

In dealing with a forbearance petition, unless the Commission can find on the record "a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation[,]"[2] it is under a legal obligation to grant a forbearance petition seeking elimination of that regulation. Stated differently, the FCC must evaluate a forbearance petition in the same manner as it would evaluate a petition seeking imposition of a new rule -- that is, it must affirmatively find that the rule in question is reasonably directed towards achieving a legitimate Commission goal (and would be legally defensible under the test set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[3]) or it must forbear from applying the rule. Under these circumstances, the burden of proof is on those opposing deregulation, and the absence of a specific type of evidence cannot be used by the Commission as a basis for denial of a properly filed forbearance petition. The Commission's apparent anticipated rejection of market share data that has already been used in other forbearance contexts would fly directly against the legal structure that Congress has established for the grant of forbearance petitions.

This *ex parte* presentation addresses three issues:

- The proper legal standard that must govern evaluation of forbearance petitions.
- The proper assignment of proof that must be utilized in evaluating any petition at the FCC that makes a *prima facie* case for grant.
- The proper role of market share data in analysis of a forbearance petition.

A. The Commission Must Apply The Proper Evaluation Standard In Determining Whether To Grant Or Deny The Qwest Petitions for Forbearance.

Sections 10 and 11 of the Communications Act were enacted into law in 1996 with the specific intention of facilitating the Commission's anticipated deregulation efforts as competition

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[1] "Cut-the-cord" customers are those who have subscribed to wireless service and discontinued all wireline service.

[2] *Cellular Telecommunications & Internet Association and Cellco Partnership v. FCC*, 330 F.3d 502, 512 (D.C. Cir. 2003) ("*Cellular Telecommunications & Internet Association*").

[3] 463 U.S. 29, 43 (1983) ("*State Farm*").

developed.[4] Both Sections 10 and 11 of the Act generally provide that regulations that are not "necessary" to achieve the goals of the Act should be eliminated.[5] With obvious reference to *State Farm*, the Commission has described this test in the forbearance context as "referring to the existence of a strong connection between what the agency has done by way of regulation and what the agency permissibly sought to achieve with the disputed regulation."[6] Indeed, so vital is the deregulatory mandate of Section 10 that a forbearance petition will be granted by act of Congress itself in the event that the Commission does not act to affirmatively deny it within fifteen months of filing.[7] In conducting the same evaluation of the term "necessary" in the context of Section 11,[8] the Commission has found that in a Section 11 context it is required to "'reevaluate regulations in light of current competitive market conditions to see that the conclusion [it] reached in adopting the rule -- that [the rule] was needed to further the public interest -- remains valid.'"[9] Not surprisingly, this includes recognition that "the Commission is under a mandate that extends beyond its normal monitoring responsibilities."[10]

In this legal context it is apparent that the FCC cannot simply deny a forbearance petition (certainly not one that makes a *prima facie* showing such as the Qwest petitions have made) on the basis that it would have preferred to be presented with different or additional facts. It must evaluate the petition based on the record and determine whether there are sufficient facts to warrant imposition of the disputed regulation today. And the FCC clearly cannot establish shifting evaluative standards (for example, considering different evidence of market share on a proceeding-by-proceeding basis) as a means of avoiding its statutory obligation to grant properly supported forbearance petitions.

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[4] *See, e.g., EarthLink, Inc. v. FCC*, 462 F.3d 1, 18-19, 20-21 (D.C. Cir. 2006) ("*EarthLink v. FCC*"); *Cellco Partnership v. FCC*, 357 F.3d 88, 90-91, 93 (D.C. Cir. 2004) ("*Cellco Partnership*").

[5] Sections 10(a)(1) and (2) require elimination of regulations not "necessary" for prevention of unreasonable pricing or discrimination, while Section 10(a)(3) calls for elimination of regulations whenever such elimination "is consistent with the public interest." In the context of the overall deregulatory impetus of Section 10, Qwest submits that the standard governing Sections 10(a)(1) and (2) also applies to Section 10(a)(3).

[6] *Cellular Telecommunications & Internet Association, supra*, 330 F.3d at 512 (quoting the FCC).

[7] *Sprint Nextel Corporation v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007).

[8] Section 11 provides that "The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest."

[9] *Cellco Partnership*, 357 F.3d at 98 (citation omitted) (quoting Commission).

[10] *Id.* at 99.

The rules that govern the legality of the FCC's decision to adopt a regulation are straightforward:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[11]

Any decision of the FCC to adopt a rule or regulation must "be supported by 'substantial evidence on the record considered as a whole.'"[12]

In this statutory scenario, the FCC must support any decision to retain the regulations that are the subjects of these petitions by substantial evidence on the record. The Commission's mandate in a forbearance proceeding "extends beyond its normal monitoring responsibilities,"[13] and the absence of evidence to support a regulation is every bit as damning in evaluating a forbearance petition as it is in considering whether to adopt a regulation in the first place.[14]

Moreover, utilization of a shifting standard of market share evaluation would not only vitiate the requirement that the decision to deny a petition for forbearance be based on substantial evidence, it would create a situation that was "so implausible" that the agency's decision could not be affirmed. It is well established that the FCC's decisions must be principled, and that the obligation to eschew a conclusion "'so implausible that it could not be ascribed to a difference in view or the product of agency expertise[]'" established in *State Farm* applies to the FCC as well.[15] Should the Commission adopt an unstable approach to market share or market share measurement that shifts to fit the Commission's predilection to deny whatever forbearance petition is before it, such an approach would fit well within the classic definition of arbitrary and

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[11] *State Farm*, *supra*, 463 U.S. at 43.

[12] *Id.*, quoting S. Rep. No. 1301, 89th Cong., 2d Sess., 8 (1966); H.R. Rep. No. 1776, 89th Cong., 2d Sess., 21 (1966).

[13] *Cellco Partnership*, *supra*, 357 F.3d at 98.

[14] *See, e.g.*, *Duke Energy Trading and Marketing, L.L.C. v. FERC*, 315 F.3d 377, 380 (D.C. Cir. 2003); *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002); *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 457 (D.C. Cir. 1988).

[15] *See Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1408 (D.C. Cir. 1996) (citation omitted); *American Library Association v. FCC*, 406 F.3d 689, 704 (D.C. Cir. 2005). *See also generally Wedgewood Village Pharmacy v. DEA*, 509 F.3d 541, 549 (D.C. Cir. 2007); *Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Administration*, 429 F.3d 1136, 1144-45 (D.C. Cir. 2005).

capricious decision-making described in *State Farm* -- far more so in the context of a forbearance petition under Section 10 where the basic Congressional mandate is deregulatory and the Commission must find that the rule under study affirmatively meets the same public interest test that would be necessary to adopt it in the first place.

B. The Commission Must Properly Hold Parties Opposing The Qwest Petitions To Meeting Their Own Burden Of Establishing The Factual Validity Of Their Positions.

Denial of Qwest's petitions because of dislike of Qwest's "cut-the-cord" figures would also violate the Administrative Procedure Act's ("APA's") burden of proof provision. Even without the special analytical provisions applicable to forbearance petitions, it would be error to allow opponents of a petition to avoid putting forth competent evidence to support their premises. Under the terms of the APA, the party seeking agency action bears an initial burden of production,[16] but once that party has made a *prima facie* case on a particular issue, the burden falls on *opposing* parties to produce evidence contradicting that case. As the Supreme Court has recognized, the APA's legislative history makes this point plain beyond doubt. The Reports issued by both the Senate Judiciary Committee and the House Judiciary Committee upon the APA's passage both included the following prescription:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that *other parties, who are proponents of some different result, also for that purpose have a burden to maintain.* Similarly the requirement that no ... rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence. For example, credible and credited evidence submitted by the applicant for a license may not be ignored except upon the requisite kind and quality of contrary evidence. *No agency is authorized to stand mute and arbitrarily disbelieve credible evidence.*[17]

The House Committee Report further explained that "in determining applications for ... relief[,] any fact, conduct, or status so shown by credible and credited evidence must be accepted as true except as the contrary has been shown or such evidence has been rebutted or impeached by duly credited evidence or by facts officially noticed and stated."[18] Reviewing this language, the

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[16] 5 U.S.C. § 556(d).

[17] S. Rep. No. 752, 79th Cong., 1st Sess., 22 (1945) (emphases added); H. R. Rep. No. 1980, 79th Cong., 2d Sess., 36 (1946) ("House Report"), *quoted in Director, Office of Worker's Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 278-79 (1994) ("*Greenwich Collieries*") (emphasis added).

[18] House Report at 36.

Supreme Court concluded that once a party before an agency "establishes a prima facie case, the burden shifts" to those seeking to rebut that case.[19]

The Commission has generally adhered to this principle, requiring those opposing a requirement to rebut the proponent's *prima facie* case. Notably, in the context of section 271 applications for in-region long-distance authority, the Commission adopted a burden-shifting arrangement to assist in determinations with regard to whether applicants had satisfied certain "competitive checklist" requirements. "Once the BOC makes a *prima facie* case of compliance, the objecting party must proffer evidence that persuasively rebuts the BOC's *prima facie* showing. The burden then shifts to the BOC to demonstrate the validity of its evidence or the state commission's approval of the disputed rate or charge."[20] In other contexts, too, the Commission recognizes that the establishment of a *prima facie* case shifts the burden to opposing parties.[21]

Because of the unique legal position afforded to forbearance petitions under the Act, the burden falling on parties opposing forbearance is *more* severe than that falling on parties opposing other regulatory actions.

In light of the above, section 10 and the APA preclude rejection of Qwest's cut-the-cord evidence. Qwest has submitted valid data based on the Center for Disease Control figures that the FCC has itself previously credited and relied upon. No party had provided credible evidence suggesting that these figures are flawed, or that they fail to accurately reflect the number of customers who have abandoned their landline connections in favor of a wireless provider. In the absence of contrary evidence -- evidence subject to "meaningful commentary" by Qwest and other interested parties[22] -- the Commission must credit Qwest's evidence, and has no basis on which to ground a rejection of its forbearance request.

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[19] *See Greenwich Collieries*, 512 U.S. at 280. *See also Rosenthal v. Bagley*, 450 F. Supp. 1120, 1124 (N.D. Ill. 1978) (under the APA, party seeking agency action bears "burden of going forward [citation omitted]" with evidence, but "[t]he burden is on the objectors to demonstrate the invalidity of the regulation[]").

[20] *In the Matter of Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization To Provide In-Region, InterLATA Services in California*, 17 FCC Rcd 25650, 25659 ¶ 19 (citation follows) (2002); *see also In the Matter of Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Authorization To Provide In-Region, InterLATA Services in Michigan*, 18 FCC Rcd 19024, 19045 ¶ 43 (2003); *In the Matter of Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, 20635-39 ¶¶ 51-59 (1998).

[21] *See, e.g.*, 47 C.F.R. § 1.1409(b) (establishing shifting burden in pole-attachment rate cases).

[22] *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982) (noting that absent public comment on evidence relied on in agency decision-

C. Reliance On Market Share Alone As the Determinative Factor In Determining To Deny The Qwest Forbearance Petitions Would be Legally Erroneous.

As Qwest has previously explained, before both the Commission and the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), reliance on a market-share test as the sole determining factor in deciding to deny a forbearance petition would be arbitrary and unlawful. While market share is a relevant factor in any consideration of market power, by itself consideration of market share as the sole factor can be misleading and often can wildly understate the full extent of a company's market power (and, concomitantly, understate the extent of true competition). To the extent that the Commission plans to rely on market share alone, rather than the true state of competition in the markets where Qwest seeks relief from dominant carrier regulation or unbundling, in denying any of the Qwest petitions a decision would be arbitrary and erroneous.

Courts have consistently required the FCC to focus its regulatory analyses on whether competition in a given market is "possible," not on whether the incumbent has already suffered economically significant market losses. "[A]s any economist knows, a 'market share' is a relatively meaningless number unless accompanied by information concerning the cross-elasticities of demand and supply that the firms in the resulting market face."[23] Courts have repeatedly applied this insight in assessing the same question the Commission faces here – the extent to which providers in a market can discipline the prices and terms offered by a larger competitor by credibly threatening to win over its customers. For example, the D.C. Circuit has held that what matters is not "only [a provider's] share of the market, but also … the elasticities of supply and demand, which in turn are determined by the *availability* of competition."[24] Other courts have repeatedly agreed: "[T]he true significance of market share data can be determined

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making, "what should be a genuine interchange" becomes "mere bureaucratic sport."). *See also Gerber v. Norton*, 294 F.3d 173, 181 (D.C. Cir.), *reh'g denied*, 2002 U.S. App. LEXIS 20118 (D.C. Cir. Sept. 19, 2002) (quoting same).

[23] 4 PHILLIP E. AREEDA, HERBERT HOVENKAMP, AND JOHN L. SOLOW, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 914 (footnote omitted).

[24] *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1134 (emphasis in original) (D.C. Cir.), *cert. denied, Consumer Fed'n of Am. v. FCC*, 534 U.S. 1054 (2001); *see also EarthLink v. FCC*, 462 F.3d at 10.

only after careful analysis of the particular market."[25] And the Commission, too, "has long held that market share is not the be-all, end-all of competition."[26]

A determinative focus on existing market share is even *less* appropriate in the context of unbundling than it is elsewhere, because relief from unbundling obligations in the wire centers at issue will promote *additional* facilities deployment by incumbents and competitors alike. In *USTA I*, the D.C. Circuit held that "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[27] As the court explained: "Some innovations pan out, others do not. If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."[28] In *USTA II*, the court again recognized that in markets where competition is otherwise possible, "[a]n unbundling requirement … seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [facilities] and ILECs fearful that CLEC access would undermine the investments' potential return." In contrast, the "[a]bsence of unbundling[]" "will give all parties an incentive to take a shot at [a] potentially lucrative market."[29]

D. Conclusion

Qwest has made a conclusive showing that it is entitled, as a matter of law, to forbearance relief in Denver, Minneapolis-St. Paul, Phoenix and Seattle. Under the applicable legal standards, the Commission could not deny these petitions unless a reasonable and reliable factual record were compiled that documented that the regulations from which Qwest seeks forbearance

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[25] *Broadway Delivery Corp. v. United Parcel Service, Inc.*, 651 F.2d 122, 128 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981).

[26] *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001), *citing Motion of AT&T Corp. to Be Declared Non-Dominant for International Service*, Order, 11 FCC Rcd 17963, 17976 ¶ 34 (1996) ("[M]arket shares, by themselves, are not the sole determining factor of whether a firm possesses market power. Other factors, such as demand and supply elasticities, conditions of entry and other market conditions must be examined..."). *See also AT&T Corp. v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001) ("'[T]he FCC has never viewed market share as an *essential* factor' in the past, and the Commission does not assert to the contrary.").

[27] *United States Telecom Association, et al. v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*"), *citing AT&T v. Iowa Utils. Bd.*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part) (noting that "compulsory sharing can have significant administrative and social costs inconsistent with the Act's purposes") (subsequent case history omitted).

[28] *USTA I*, 290 F.3d at 424 (footnote and citations omitted).

[29] *United States Telecom Association v. FCC*, 359 F.3d 554, 584 (D.C. Cir. 2004) ("*USTA II*") (subsequent case history omitted).

could have been lawfully adopted today in the markets in question. No such record exists. Accordingly, Qwest is entitled to the relief requested in its four petitions.

Respectfully submitted,

/s/ Craig J. Brown

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